FILE COPY

Office Supreme Court, U. S.
FILED
SEP 25 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF PETITIONERS

In Support of Their Motion for Leave to File a Reply to the Return of the Respondent.

WILLIAM A. SMITH,
Attorney-general of the State of Kansas.
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas.
JOHN F. RHODES,
Attorneys for Petitioners.

13-1179

INDEX.

PAGE

STATEMENT 3

POINTS AND AUTHORITIES:

The ancient common law rule that a traverse to a return was not permitted in mandamus 4

The reversing of the ancient rule by statute 4

This court will not follow the ancient English practice if it does not effect the ends of justice 4

A reply may be filed traversing allegations of fact in the return to a rule to show cause or an alternative writ of mandamus 4

CASES, TEXTBOOKS AND STATUTES:

CASES:

Ex Parte Newman, 14 Wall. (81 U. S.) 152, 166; 20 L. ed. 877 6

Ex Parte Rowland, 14 Otto (104 U. S.) 604, 615; 26 L. ed. 861 7

State of California v. Southern Pacific R. Co., 157 U. S. 229, 249; 39 L. ed 683 5

State of Florida v. State of Georgia, 17 How. 478, 493; 15 L. ed. 181 5

United States v. Boutwell, 17 Wall. (84 U. S.) 604, 608, 609; 21 L. ed. 721, 6

United States v. Schurz, 12 Otto (102 U. S.) 378, 392; 26 L. ed. 167, 170, 6

Work v. United States ex rel. Rives, 267 U. S. 175, 184, 185; 69 L. ed. 561, 7

United States, ex rel. Turner, v. Fisher, 222 U. S. 204, 209; 56 L. ed. 165, 7

TEXTBOOKS:

Merrill on Mandamus, sections 268, 288, 289 7

Tapping on Mandamus, page 383, also pages 422, 472, 481, American Edition of 1853 5

STATUTES:

Statute of 9th Anne, ch. 20 (Extract from printed at page 472, Appendix to Tapping on Mandamus, American Edition of 1853) 5

Statute of 1st William IV, ch. 21 (Extract from printed in Tapping on Mandamus, id. page 481) 5

In the Supreme Court of the United States.

October Term, 1929—No. 20, Original.

Ex Parte: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable JOHN C. POLLOCK, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF PETITIONERS

In Support of Their Motion for Leave to File a Reply to the Return of the Respondent.

STATEMENT.

Some of the allegations contained in the petition are not denied by the return of the respondent to the rule to show cause why a writ of mandamus should not be allowed directed to the respondent. Some of the allegations are, however, denied, and there are allegations of new matter in the return which the petitioners desire to meet by a reply.

It is stated in rule No. 5 of the court, as follows:

"This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court in matters not covered by its rules or decisions, or the laws of Congress."

POINTS AND AUTHORITIES.

The ancient common law rule that a traverse to a return was not permitted in mandamus.

Tapping on Mandamus, p. 383 (p. 422 American Edition of 1853).

The reversal of the ancient rule by statute.

Statute of 9th Anne, chapter 20.
Statute of 1st William IV, chapter 21.

This court will not follow the ancient English practice if it does not effect the ends of justice.

State of Florida v. State of Georgia, 17 Howard 478, 493; 15 L. ed. 181.
State of California v. Southern Pacific R. Co., 157 U. S. 229, 249; 39 L. ed. 683.

A reply may be filed traversing allegations of fact in the return to a rule to show cause or to an alternative writ of mandamus.

State of Florida v. State of Georgia, 17 Howard 478, 493; 15 L. ed. 181.
Ex parte Newman, 14 Wallace 152, 166; 20 L. ed. 877.
United States v. Boutwell, 84 U. S. 604; 21 L. ed. 721.
United States v. Schurz, 12 Otto (102 U. S.), 378, 392; 26 L. ed. 167, 170.
Ex parte Rowland, 14 Otto (104 U. S.) 604, 615; 26 L. ed. 861.
State of California v. Southern Pacific R. Co., 157 U. S. 229, 249; 39 L. ed. 683.
Work v. United States ex rel. Rives, 267 U. S. 175, 184, 185; 69 L. ed. 165.
United States, ex rel. Turner, v. Fisher, 222 U. S. 204, 209; 56 L. ed. 165.
Merrill on Mandamus, sections 268, 288, 289.

ARGUMENT.

This court will follow the ancient English practice under this rule of court only so far as it will effectuate the ends of justice, and if it fails to do so will adopt its own rule for the purpose.

State of Florida v. State of Georgia, 17 Howard 478, 493; 15 L. ed. 181.

State of California v. Southern Pacific R. Co., 157 U. S. 229, 249; 39 L. ed. 683.

It was the ancient English rule at common law that no traverse to a return in mandamus was allowed, but if the relator was injured by a return false in fact he had an action on the case for a false return. If the relator recovered in such action then a peremptory writ of mandamus would issue.

Tapping on Mandamus, 383, p. 422, American edition of 1853.

The old rule was dilatory, impracticable and unjust at least as applied to later conditions.

By the Statute of 9th Anne, chapter 20 (extract from printed at p. 472, appendix to Tapping on Mandamus, American edition of 1853), it was provided that a person suing out a writ of mandamus could plead to or traverse all or any of the material facts contained within the return to the writ. That statute was addressed to the trial of the rights to corporate offices or franchises.

By the Statute of 1st William IV, chapter 21 (extract from printed in Tapping on Mandamus, *id.*, p. 481), the provisions of the Statute of Anne were extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far as they might be varied or altered by the later statute. It authorized the raising of issues of fact or law by traverse to the return to the writ.

In *Ex parte Newman*, 14 Wallace 152, 166, 20 L. ed. 877, where a rule to show cause why a peremptory writ of mandamus should not be granted was issued by the supreme court to a United States circuit judge, this court stated: "Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent."

This quotation implies that the relator would have a right to deny by a reply allegations in the return.

In *United States v. Boutwell*, 17 Wall. (84 U. S.) 604, 608, 609, 21 L. ed. 721, the mandamus action was begun in the supreme court of the District of Columbia. This court said that by the Statute of 9th Anne, chapter 20, section 1, mandamus became in effect a personal action against the defendant.

It follows from that statement that the ordinary rules as to making an issue in personal actions by means of a reply should apply here.

In *United States v. Schurz*, 12 Otto (102 U. S.) 378, 392, which was begun in the supreme court of the District of Columbia, 26 L. ed. 167, 170, it was stated,

"Some question was made, on the argument in this court, as to the effect of the answer as evidence, and the practice in the Court of King's Bench, in England, has been referred to as making the return to the writ conclusive, or at least evidence, of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

"No writ of mandamus, alternative or otherwise, was issued. And there was, therefore, no technical return to such a writ, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of mandamus, the parties have voluntarily made their own issues, and stipulated as to the evidence which shall be considered by the court."

In the pending case no alternative writ of mandamus was issued. A rule to show cause was issued, and the ancient rule prior to the Statute of 9th Anne, chapter 20, in England, as to the conclusive effect of the answer on points of fact, does not apply.

In *Ex parte Rowland,* 14 Otto (104 U. S.) 604, 615; 26 L. ed. 861, on a petition for a writ of habeas corpus, there was considered by the court a mandamus proceeding in the United States circuit court in Alabama. It was said,

"We proceed now to the consideration of the return of the commissioners to the rule upon them to show cause why they should not be attached for disregarding the writ. Their statements in the return have not been controverted, and are, consequently, to be taken as true. While the return to the mandamus itself was quashed, the return to the rule stands in the place of a return to the writ for all the purposes of this proceeding."

This statement implies that a reply could have been filed controverting the allegations in the return.

In *United States, ex rel. Turner, v. Fisher,* 222 U. S. 204, 209, 56 L. ed. 165, the mandamus action was begun in the supreme court of the District of Columbia. This court stated,

"Where a general demurrer to an answer containing such defense was overruled, and the relators, instead of replying, elected to stand on their demurrer, the writ of mandamus was properly refused."

This implies that a reply might have been filed.

On the same point, see *Work v. United States, ex rel. Rives,* 267 U. S. 175, 184, 185, 69 L. ed. 561.

In order to enable this case to be determined upon the facts, it is necessary that a reply be filed raising issues upon certain allegations in the return. It is a well-established practice in the courts of this country that a traverse to the return to an alternative writ of mandamus, or a rule to show cause why a writ should not be issued, may be filed.

Merrill on Mandamus, sections 268, 288, 289.

We submit that it is plain from the quotations from the opinions of this court which we have given that it is proper that such reply should be filed.

Respectfully submitted,

WILLIAM A. SMITH,
Attorney-general of the State of Kansas,
JOHN G. EGAN,
Assistant Attorney-general of the State of Kansas,
JOHN F. RHODES,
Attorneys for Petitioners.

□

13-1179